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In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA, IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

In November 1996, the voters of the State of California adopted Proposition 215, the Compassionate Use Act of 1996, approving the use of cannabis for seriously ill people. The State of California seeks to protect the sovereign interest of its jurisdiction and specifically those of its electorate. The State of California has a unique and constitutionally protected interest in the enactment of a state initiative addressing the health and welfare of its citizens. The initiative enacted by the voters of the State of California is an expression of their will reflecting what they believe ought to be lawful conduct in California. To the extent the citizens of the various states, independently and collectively, do not disturb the national interest, the Ninth and the Tenth Amendments to the United States Constitution guarantee the states the privilege of debating the issue of whether their citizens may utilize cannabis to treat serious illness. The electorate in California have declared their view on this question and it should be respected by this Court as a democratic exercise properly reserved to the states.

The states are the laboratories of democracy in our federal system. (*Washington v. Glucksberg*, 521 U.S. 702 (1997); *Cruzan v. Missouri Dept. of Health*, 497 U.S. 261, 292 (1990); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932), Brandeis, J., dissenting.) The Constitution does not prevent the states from expressing their preference for allowing citizens to use cannabis to treat serious illness.

The opinion of the Court of Appeals directing the district court to craft an injunction broad enough to prohibit illegal conduct, but narrow enough to exclude conduct that is likely privileged or justified due to medical necessity, is congruent with Proposition 215. The voters of California sought to make cannabis available to seriously ill people. The district court's modification of its injunction permitting seriously ill Californians to use cannabis for medicinal purposes is a proper exercise of the board equitable discretion vested in that court.

The modified injunction limits the use of cannabis to a very narrow class of people. The injunction sets forth clear and enforceable conditions for the use of cannabis by seriously ill persons who have no other legal alternatives. This injunction is consistent with the spirit and intent of the Compassionate Use Act of 1996.

The authority of the states to debate and decide matters of medical necessity is not an appropriate subject of federal review. The states have a sovereign interest in matters pertaining to the health and welfare of their citizens, and the state ballot initiative process is a valid and lawful manner for those citizens to develop policy in these areas. California's voters have spoken. The State of California submits that this Court should protect the ability of her citizens to do so.

ARGUMENT

A. INTRODUCTION

Since 1996, eight states and the District of Columbia, have had ballot initiatives authorizing the use of cannabis

for seriously ill people approved by their respective voters. In California, voters passed Proposition 215, the Compassionate Use Act of 1996. The Compassionate Use Act provides in relevant part as follows:

> "The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:
>
> > (A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.
> >
> > (B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction. . . . "

(Cal. Health & Saf. Code § 11362.5(b)(1)). The Act also provided that cannabis used for non-medicinal purposes remained prohibited: "Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes." (Cal. Health & Saf. Code § 11362.5(b)(2).)

In 1970, Congress passed the Controlled Substances Act, classifying cannabis as a "Schedule I" drug which means: "The drug or other substance has a high potential

for abuse; the drug or other substance has no currently accepted medical use in treatment in the United States; there is a lack of accepted safety for use of the drug or other substance under medical supervision." (21 U.S.C. § 812.)

In January 1998, the federal government filed a civil action in the United States District Court for the Northern District of California, seeking an injunction prohibiting respondent from distributing cannabis to seriously ill people in Oakland, California. On May 19, 1998, the district court issued a preliminary injunction enjoining respondent from providing cannabis to seriously ill people.

Following a subsequent appeal to the Ninth Circuit Court of Appeal, the district later modified its injunction to permit distribution of cannabis to patients who suffer from a serious medical condition, who desire and need cannabis, and who have no other "legal alternatives for the effective treatment or alleviation of the patient-members' condition . . . . " (District Court Decision of July 17, 2000 at p. 2.)

The State of California contends the district court's modification of its injunction is congruent with the ballot initiative approved in its states. The Compassionate Use Act of 1996 represents a sovereign expression of choice by California voters that cannabis should be available to seriously ill persons. The district court's injunction represents a clear, enforceable, and narrow judicial order allowing seriously ill people with no other legal alternatives the option to alleviate or treat their symptoms or illness by using cannabis when recommended by a licensed physician.

Amicus submits the district court's injunction is sufficiently narrow that only those whose conduct would likely be privileged, excused or justified may use cannabis. This exercise of the lower court's broad equitable discretion does not disrupt the federal government's ability to enforce the Controlled Substances Act. The injunction is broad enough to prohibit illegal conduct.

The Controlled Substances Act unduly interferes with the privilege afforded the states by the Ninth Amendment to enact voter approved initiatives protecting the health, safety and welfare of their citizens.

Finally, the State of California contends application of the Controlled Substances Act to prohibit the use of cannabis by seriously ill persons in states which have voter approved ballot initiatives violates traditional notions of state sovereignty protected by the Tenth Amendment.

This Court should protect the interest of California's citizens and affirm the district court's modification of the preliminary injunction allowing seriously ill persons with no other legal alternatives to use cannabis to treat their symptoms or illness.

B. THE CONTROLLED SUBSTANCES ACT UNDULY INTERFERES WITH THE NINTH AMENDMENT ABILITY OF STATES TO ENACT VOTER APPROVED LEGISLATION

The State of California contends application of the Controlled Substances Act by the federal government to prohibit seriously ill citizens of California from using cannabis pursuant to the Compassionate Use Act unduly

interferes with its sovereign privilege to address matters of health, safety and welfare through the ballot initiative process. The issue of whether cannabis should be used by seriously ill patients is a controversial subject area, best decided by the states through the democratic process. This is precisely what happened in 1996, when voters in California approved Proposition 215 through a ballot initiative. This Court should not overturn what the democratic process has sanctioned in California.

i. The Ninth Amendment Limits the Power of Congress and the Federal Government to Enact Legislation Interfering with State Sovereignty.

The Ninth Amendment limits the power of Congress and the federal government to pass legislation that unduly interferes with California's interest in regulating the health, safety and welfare of its citizens. As applied, the Controlled Substances Act appears to prohibit seriously ill Californians from using cannabis. The State of California maintains this type of intrusion by the federal government is prohibited by the Ninth Amendment.

The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Court has on limited occasions addressed the scope of the Ninth Amendment.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), both Justice Goldberg in his concurring opinion, and Justice Black in his dissenting opinion, discussed the scope of the Ninth Amendment as applied to the federal government.

Justice Goldberg, concurring, wrote: "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from government infringement, which exist alongside those fundamental rights specifically mentioned in the first eight amendments." *Id.* at 488. Justice Goldberg relied on history to find that the Ninth Amendment serves two purposes: To make certain that the enumeration of specific rights would not mean other rights could be denied and to limit the federal government. He stated:

> "The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected." *Id.* at 488-489.

Justice Goldberg also commented: "The Ninth Amendment – and indeed the entire Bill of Rights – originally concerned restrictions upon *federal* power . . . " *Id.* at 493 (Emphasis in original.)

Justice Goldberg concluded by noting:

> "In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments." (*Id.* at p. 493.)

Justice Black also noted that the Ninth Amendment was intended to limit the powers of the federal government: "That Amendment was passed, not to broaden the powers of this Court or any other department of 'the General Government,' but as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the federal government to the powers expressly or by necessary implication." *Id.* at 520.

Consistent with *Griswold*, the Court in *City of Boerne v. P.F. Flores*, 521 U.S. 507 (1997), held that congressional enactment of the Religious Freedom Restoration Act of 1993 (RFRA) unduly burdened the states' traditional right to regulate the health and welfare of their citizens.

Although not expressly a Ninth Amendment case, Justice Kennedy, writing for the Court in *City of Boerne* stated: "Under our Constitution, the Federal Government is one of enumerated powers. [Citation]. The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the 'powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.' [Citation]." *Id.* at 516. In determining that the RFRA unduly interfered with the rights of the states, Justice Kennedy stated:

> "The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. If an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and show that the law is the least

> restrictive means of furthering its interest . . . . This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Id.* at 533-534.

In this case, pursuant to the traditional right "to regulate for the health and welfare of their citizens," California enacted voter approved legislation. This legislation permits the use of cannabis for medical purposes, provided that strict guidelines are adhered to. Unlike the Religious Freedom Restoration Act of 1993 in *City of Boerne*, the Controlled Substances Act does not even allow the states to "demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest." *Id.* Rather, the Controlled Substances Act classifies "marihuana" as a Schedule I substance and places a blanket prohibition on the substance: "It shall be unlawful for any person knowingly or intentionally – (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense," any amount of cannabis. (21 U.S.C. § 841(a)).

Unquestionably, the Controlled Substances Act unduly intrudes into California's traditional right to regulate for the health and welfare of their citizens. The Act deprives the various states of any meaningful opportunity to act within the bounds of traditional state sovereignty. This case presents the exact scenario that James Madison expressed concern for when the Ninth Amendment was introduced. Voters from California, through the state ballot initiative process, approved a statute the federal government now seeks to prohibit. Nowhere does the

Constitution expressly give the power to regulate the usage of cannabis for medical purposes to Congress. This intrusion by the federal government into state sovereignty threatens to upset the balance of federalism and should not be permitted by this Court.

ii. The Debate Surrounding the Right of Seriously Ill Patients to Use Cannabis Is an Issue Best Suited for Resolution Through the Democratic Process in the States.

Several members of this Court have previously recognized controversial areas of social policy upon which reasonable persons may differ are best resolved through the democratic process. The State of California maintains the debate over whether to allow seriously ill patients the right to use cannabis with the advice and consent of a physician is one such controversy.

In *City of Boerne*, a case dealing with the ability of the federal government to restrict the ability of states to burden religious interests, Justice Scalia wrote: "The issue presented by *Smith* is, quite simply, whether the people, through their elected representatives, or rather this Court shall control the outcome of those concrete cases. For example, shall it be the determination of this Court, or rather of the people, whether church construction will be exempt from zoning laws? . . . It shall be the people." *Id.* at 544.[1]

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[1] The Court in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) was presented with the issue

In *Doe v. Bolton*, 410 U.S. 179 (1973), a companion case to the controversial *Roe v. Wade*, 410 U.S. 113 (1973), decision, Justice White dissenting stated: "In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power choice by interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to examine it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs." *Id.* at 222.

Chief Justice Rehnquist writing for the Court in *Washington v. Glucksberg*, 521 U.S. 702 (1997), on the issue of physician-assisted suicide stated: "By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' [Citation], lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court. [Citation]." *Id.* at 720.

Justice O'Connor's concurring opinion in *Glucksberg* described the role of the States in formulating safeguards to protect the people as follows:

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of whether states may constitutionally refuse unemployment compensation to persons who ingest peyote as a religious practice.

> "Every one of us at some point may be affected by our own or a family member's terminal illness. There is no reason to think the democratic process will not strike the proper balance between the interests of the terminally ill, mentally competent individuals who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly or under pressure . . . In such circumstances, 'the . . . challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the 'laboratory' of the States . . . in the first instance.' [Citation]." *Id.* at 737.

In *Planned Parenthood Of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), Justices O'Connor, Kennedy, and Souter wrote on the ability of the State to regulate abortion: " 'The Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth.' [Citation]." *Id.* at 872.

Justice Scalia, concurring in the judgment in part and dissenting in part, reiterated the desire to allow citizens, using the democratic process, to decide the issue of regulating abortion: "The States may, if they wish, permit abortion on demand, but the Constitution does not require them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." *Id.* at 979.

Justice Scalia went on to explain the impact of denying citizens the right to use the democratic process: "By foreclosing all democratic outlet for the deep passions

this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish." *Id.* at 1002. Finally, Justice Scalia concluded: "We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining." *Id.* at 1002.

The issue in this case is similar to those dealing with the right to abortion and the right to end one's life. In both areas, the Court has faced great public debate, with various groups supporting each side of the issue. In this case, the debate surrounds the use of cannabis for medical treatment.

On one side of the debate are groups and individuals such as the Family Research Council, who have submitted a separate Amicus Curiae brief in this case. They argue that cannabis is "bad medicine," the harm caused by the substance outweighs any benefits, and it leads to many social and public harms. (See Amicus Brief Of Family Research Council As Amicus Curiae In Support Of Petitioner.)

On the other side are physicians and seriously ill patients who feel that cannabis has been highly effective in the treatment of seriously ill patients, including those with AIDS and Cancer. (See Joint Appendix; Decl. Marcus A. Conant, M.D. at pp. 101-102; Declaration Lester Grinspoon, M.D. at pp. 127-130, 136).

The division between those who do and do not support the use of cannabis in medical situations, presents a unique question for both the State of California and the Court. In the aforementioned cases, the issue essentially boiled down to whether the states could impose regulations on abortion and physician-assisted suicide. Here, California has elected not to restrict or prohibit the use of cannabis by seriously ill people.

The People of California have already resorted to the democratic process by approving various state initiatives approving the use of cannabis for medicinal purposes. The federal government seeks to invalidate one of these state initiatives by challenging the district court's modification of an injunction permitting the distribution of cannabis by respondent. The lower court's injunction permits activity consistent with the will of the voters in California. California voters approved an initiative allowing her citizens to utilize cannabis for medicinal purposes. This Court should not disturb the sovereign vote of the people in the State of California. Proposition 215 represents the final expression of public debate in California on this issue. This Court must respect this initiative as a constitutional expression of regional interest.

iii. States Are Entitled to Create an Exception for Cannabis under the Controlled Substances Act Because of the Traditional State Interest in Regulating for the Health, Safety and Welfare of Citizens.

California contends that under traditional principles of state sovereignty and federalism, states are entitled to

create exceptions to the Controlled Substances Act when acting pursuant to their right to regulate for the health, safety and welfare of citizens. In this case, voters from California have approved ballot initiatives permitting the use of cannabis for seriously ill persons. These initiatives serve as an exception to the Controlled Substances Act. Exceptions to the Controlled Substances Act were discussed by this Court in *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872 (1990).

In *Smith,* the issue was whether Oregon was required under the First Amendment to establish an exception to current drug laws for sacramental peyote, a Schedule I drug under the Controlled Substances Act.

Justice Scalia, writing for a majority of the Court stated:

> "Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. **It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use.** [emphasis added]." *Id.* at 890.

Justice O'Connor concurring also stated that the states have a right to create an exception for peyote even though it is classified as a Schedule I substance under the

Controlled Substances Act: "But other governments may surely choose to grant an exemption without Oregon, with its specific asserted interest in uniform application of its drug laws, being required to do so by the First Amendment." *Id.* at 906.

Justice Blackmun dissenting suggested that states may very well be able to create an exception for peyote, in the process mentioning the medical use of marijuana:

> "The fact that peyote is classified as a Schedule I controlled substance does not, by itself, show that any and all uses of peyote, in any circumstance, are inherently harmful and dangerous. The Federal Government, which created the classifications of unlawful drugs from which Oregon's drug laws are derived, apparently does not find peyote so dangerous as to preclude an exemption for religious use. **Moreover, other Schedule I drugs have lawful uses. See Olsen v. Drug enforcement Admin., 279 U.S. App. D.C. 1, 6, n.4, 878 F.2d 1458, 1463 n.4 (medical and research uses of marijuana).** [emphasis added]" *Id.* at 912-913.

These opinions throughout the Court's decision in *Smith,* suggest a willingness to permit states to enact legislation providing for limited use of Schedule I substances. Furthermore, they suggest the Controlled Substances Act does not act as a blanket prohibition on the use of Schedule I substances.

Unlike *Smith* where the Court was asked to find an exception in both state and federal laws prohibiting the use of peyote, amicus here asks the Court to uphold voter enacted exceptions to the Controlled Substance Act. Justice Scalia's opinion in *Smith* supports resorting to the

democratic process for deciding the limitations to the Controlled Substances Act:

> "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs." *Id.* at 890.

The ballot initiative passed by the voters of California represent the type of social and economic experimenting the Court should embrace as fitting perfectly within the federal scheme reserving certain privileges to the states. Justice Brandeis, dissenting in *New State Ice Co. v. Liebmann*, 262 U.S. (1932), expressed similar approval for the actions of a single state:

> "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."

The Court should uphold the decision of California voters to create an exception to the Controlled Substances Act for seriously ill people with no other legal alternative to alleviate their symptoms or illness.

C. APPLYING THE CONTROLLED SUBSTANCES ACT TO PROHIBIT THE USE OF CANNABIS BY SERIOUSLY ILL PEOPLE IN CALIFORNIA VIOLATES TRADITIONAL NOTIONS OF STATE SOVEREIGNTY PROTECTED BY THE TENTH AMENDMENT.

Application of the Controlled Substances Act by the United States to prohibit the use of cannabis, by persons with serious medical conditions under narrow circumstances, violates the states' traditional right to promulgate regulations for the public health, safety and welfare of their citizens.

The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In *Kansas v. Colorado*, 206 U.S. 46 (1907), the Court defined the purpose of the Tenth Amendment: "This amendment, which was seemingly adopted with the prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted." *Id.* at 90. In determining the scope of the Amendment, the Court stated: "If the Constitution in its grant of power is to be so construed that Congress shall be able to carry into full effect the powers granted,

it is equally imperative that where prohibition or limitation should be enforced in its spirit and to its entirety." *Id.* at 91.

The underlying reasoning and inherent scope of the Tenth Amendment suggests that federal enforcement of the Controlled Substances Act on the individual states violates the expressed protection given to the states. Indeed, the Court has held that individual states have a vital interest in preserving the public health, safety and welfare through state promulgated regulations. This right cannot be abridged by Congress simply because the subject matter concerns cannabis.

As early as 1859, the Court has held that states did not give up the right to act as a "sovereign over their persons and property, so far as it was necessary to preserve the peace." *Cutler v. Dibble*, 62 U.S. 366, 370 (1859). More recently, the Court has stated on several occasions that states possess a legitimate interest in regulating the health of their citizens.

In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), Justices O'Connor, Kennedy, and Souter defined the state's interest in a woman's life with respect to abortion: "The state has legitimate interests in the health of the woman and in protecting the potential life within her . . . . " *Id.* at 872. Furthermore, the Justices stated: "It follows that states are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." *Id.*

Justice Stevens concurring in *Washington v. Glucksberg*, 532 U.S. 702 (1997) wrote:

> "The State has an interest in preserving and fostering the benefits that every human being may provide to the community – a community that thrives on the exchange of ideas, expressions of affection, shared memories and humorous incidents as well as on the material contributions that its members create and support." *Id.* at 741.

Chief Justice Rehnquist writing for the Court on the issue of the right to die, in the case of *Cruzan v. Missouri*, 497 U.S. 261 (1990) stated:

> "But in the context presented here, a State has more particular interests at stake. The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements." *Id.* at 281.

Again, history helps to shed some light on the issue before the Court in this case. Nearly a century ago, the Court recognized the power of the states to enact laws for the safety and health of its citizens. In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Court compared the right of a state to enact laws for the health and safety of its citizens to the principle of self-defense: "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." (*Id.* at 27.) In *Jacobson*, the Court dealt with an issue similar to the one in this case. There, the debate concerned a Massachusetts law that required smallpox vaccinations to prevent the spread of the disease. At the time of *Jacobson*,

there was a great debate concerning the effectiveness of a smallpox vaccination throughout the world. (*Id.* at 35.) Nevertheless, the Court stated:

> " 'The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action; for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the constitution, and would sanction measures opposed to a republican form of government. While we do not decide and cannot decide that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the common belief of the people of the State, and with this fact as a foundation we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power.' [Citation]." *Id.* at 35.

In this case, as in *Jacobson*, the voters of California have expressed their belief that cannabis should be available to persons with a serious illness who have no other legal alternative to treat their symptoms or illness. The federal government threatens to cross the line of state sovereignty and interfere with a traditional state right.

Today, there is no doubt that medical knowledge would not question the benefit of a small pox vaccination. In the early 1900's, however, there was a heated debate, over which reasonable minds did disagree. Cannabis is no different. The Court did then as it should now, refrain from upsetting the balance of federalism under the Tenth Amendment and imposing beliefs of the Court on the public. The actions of the federal government infringing on an established right of the states to enact voter approved legislation to protect the welfare and safety of those voters, violates the Tenth Amendment.

CONCLUSION

The State of California respectfully requests the decision of the district court modifying its injunction to permit the use of cannabis by seriously ill Californians be affirmed. The lower court's injunction is sufficiently broad enough to prohibit illegal conduct proscribed by the Controlled Substances Act, but narrow enough to accommodate seriously ill people who may need cannabis to alleviate suffering. The district court's order is congruent with Proposition 215.

Proposition 215 does not disturb the balance of federalism or enforcement of the Controlled Substances Act. Indeed, the initiative is a sovereign expression of social policy voiced through the democratic process. The district court's order, as modified, is consistent with Proposition 215 and should be respected by the federal government and this Court so seriously ill people who

have exhausted conventional methods of therapy can use cannabis to relieve their suffering.

February 19, 2001

Respectfully submitted,

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